



Commonwealth of Massachusetts

Division of Fisheries & Wildlife

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Interim Guidance on the Division of Fisheries and Wildlife Review of Project or Activities Initiated Prior to Issuance of the 2006 Priority Habitat Maps

I. Background and Need for this Interim Guidance

The Division of Fisheries and Wildlife (the “Division”) administers and enforces the Massachusetts Endangered Species Act, M.G.L. c. 131A (“MESA”) through its regulations at 321 CMR 10.00. As described in 321 CMR 10.12 of the MESA regulations, Priority Habitats are used for screening Projects and Activities that may result in the Take of State-listed Species and to provide guidance to Record Owners regarding a Project or Activity through consultation with the Division. The Division delineates Priority Habitats in Massachusetts based on the Best Scientific Evidence Available, which takes into consideration the latest state-listed species data, understanding of species biology and habitat requirements, and GIS technology and data. The Division develops maps of Priority Habitats that are published in its Natural Heritage Atlas (the “Atlas”). The Division re-evaluates its delineation of Priority Habitats every two years to respond to new information on the distribution of State-listed Species, which, in turn, results in the publication of an updated version of the Atlas. The current edition of the Atlas was published and made effective on October 1, 2006, and will be updated again in October 2008.

The Division acknowledges that there are project proponents who have taken significant action towards implementing their project in reliance on the earlier edition of the Atlas that showed that their project site was not located in Priority Habitat. The subsequent publication of the Division’s 2006 edition of the Atlas then identified all or a portion of their project site in a newly delineated Priority Habitat, thereby potentially affecting the siting, scope and timing of the project. The Division recognizes that such outcomes raise legitimate questions of equity and consistency that are appropriate for the Division to address in the form of guidance to staff when applying the MESA regulations in such circumstances. In short, the Division believes that if a project has achieved significant milestones in reliance on being outside of a Priority Habitat, fairness dictates that such projects should not have to begin permitting anew because the subsequent publication of the 2006 edition of the Atlas placed their project in Priority Habitat.

This Interim Guidance is consistent with the equity principles in 321 CMR 10.13 (“Projects Not in Priority Habitat”) which recognizes that there are circumstances where a project outside of Priority Habitat at the commencement of significant development or

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permitting activities can continue to rely on that status, notwithstanding the subsequent availability of new information and/or in the absence of a Division determination to the contrary. This Interim Guidance is a reasonable approach to addressing a limited number of projects that are caught in the above situation between now and the publication of the updated Atlas one year from now, in October, 2008.

II. Applicability and Requirements of this Interim Guidance

This Interim Guidance applies to Projects or Activities that were not in Priority Habitat, as determined by the earlier 2004 edition of the Atlas, and whose proponents, in reliance on that information, took significant actions towards implementing the Project or Activities, as specified below, prior to the publication of the current 2006 edition of the Atlas. More specifically, such Projects or Activities will not be subject to Division review pursuant to 321 CMR 10.18 (“Review of Projects or Activities for Take of State-listed Species in Priority Habitat”) if they reached any one of the following project implementation milestones prior to the project site being mapped as Priority Habitat in the current October 1, 2006 edition of the Atlas, or within the time frame set forth in Section II.2.b. below. However, only that portion of the Project or Activity that is the subject of the implementation milestones identified below is not required to be reviewed under 321 CMR 10.18.

1. Milestones Related to Massachusetts Environmental Policy Act (“MEPA”) Review

- a. the project proponent has filed an Environmental Notification Form (“ENF”) and (1) a State-listed Species issue was not raised in any comment letter submitted during the MEPA comment period by the Division or another party, or, if an issue was raised, it has been resolved to the satisfaction of the Division, and (2) the Secretary determined that an Environmental Impact Report (“EIR”) was not required; or
- b. the Secretary has determined that the Draft EIR was adequate and no MESA issues were raised by the Division during the MEPA comment period; or
- c. the Secretary has issued a certificate on a FEIR determining that the project or activity adequately and properly complies with MEPA.

Note: Projects or Activities for which a Notice of Project Change (“NPC”) that is material and relevant to MESA is thereafter filed with MEPA are not covered under this Interim Guidance and must comply with 321 CMR 10.18.

2. Milestones Related to the Wetlands Protection Act (“WPA”)

- a. the issuing authority has issued either an Order of Conditions or a Superseding Order of Conditions for the Project or Activity; or

- b. the proponent obtained one of the above referenced orders for the Project or Activity within six (6) months of the publication of the current October 1, 2006 edition of the Atlas.

Note: The above referenced WPA permitting milestones do not require that any appeal of the Order of Conditions or a Superseding Order of Conditions be resolved, except when the appeal of the order relates to a MESA issue.

3. Milestones Related to Other Permitting Actions

- a. if the Project or Activity does not require an Order of Conditions under the Wetlands Protection Act, then upon the issuance of any permit or approval for the Project or Activity, provided such permit or approval has been subject to public hearing that was publicly noticed; or
- b. if the Project or Activity does not require the issuance of a permit or approval for which a public hearing is required, then if a building permit for the Project or Activity has been issued.

The Division reserves the right to determine, based on special circumstances, that any Project or Activity within the scope of this Interim Guidance shall be subject to the review process under 321 CMR 10.18 to prevent a substantial and permanent modification, degradation or destruction of Priority Habitat, as delineated in the current, 2006 Atlas. In addition, no Project or Activity that has already obtained a Take determination and/or been issued a Conservation and Management Permit by the Division is covered by this Interim Guidance.

By the date of the publication of the next updated Atlas in 2008, the Division will conduct a review of this Interim Guidance based on its application to Projects and Activities during this interim period, and evaluate whether the Interim Guidance should remain in effect or be modified.